NO. 79-972

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION

Petitioners,

VERSUS

ADAMS EXTRACT COMPANY, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF TEXAS INDUSTRIES, INC. IN SUPPORT OF PETITIONERS

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF TEXAS INDUSTRIES, INC. IN SUPPORT OF PETITIONERS

Interest of Texas Industries, Inc. as Amicus Curiae in No. 79-972

The interest of Texas Industries, Inc. as ***amicus curiae*** in this matter is identical to that of the petitioners herein, Westvaco Corporation, Packaging Corporation of America and Georgia-Pacific Corporation. Texas Industries, Inc. submits this Brief as ***amicus curiae*** in favor of a rule recognizing the right to contribution under the federal antitrust laws.

Texas Industries, Inc. is the petitioner for writ of certiorari in ***Texas Industries, Inc. v. Radcliff Materials, Inc., Jimco, Inc. and OKC Dredging Inc.***, which bears docket No. 79-1144 of this Court. The issue presented to the Court in that petition is whether a defendant in a federal antitrust case may seek

contribution.

This Court has not acted on the petition of Texas Industries, Inc. in No. 79-1144 and it appears that the Court will not act on said petition until such times as 79-972, ***Westvaco Corporation, et al v. Adams Extract Company, et al,*** is decided. The positions taken before the United States Court of Appeals for the Fifth Circuit by petitioners herein, though supportive of the claim for a right of contribution in federal antitrust cases, present certain different legal arguments than did Texas Industries before the Court of Appeals for the Fifth Circuit. Additionally, the decision of the Court of Appeals for the Fifth Circuit from which petitioners herein sought their writ of certiorari merely followed, in a ***per curiam*** opinion, its earlier decision in ***Wilson P. Abraham Construction Corporation v. Texas Industries, Inc.,*** 604 F. 2d 897, wherein it dealt at length with the various arguments presented by Texas Industries, Inc. Texas Industries therefore suggests that those arguments should be presented to and considered by this Court.

The history of the litigation leading to the petition of Texas Industries, Inc. to this Court for a writ of certiorari is as follows:

On January 26, 1973, a grand jury sitting in the United States District Court, Eastern District of Louisiana, handed down criminal indictments charging Texas Industries and one of its employees, Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. and one of its employees, and Jimco, Inc. with violations of 15 U.S.C. 1. The indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade consisting of an agreement between the defendants to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded upon the entry

of *nolo contendere* pleas by each of the defendants.

On September 8, 1975, Wilson P. Abraham Construction Corporation instituted this action against petitioner, Texas Industries, Inc. The complaint centers around alleged antitrust violations by Texas Industries and its alleged co-conspirators.

Interrogatories filed by Texas Industries, and answers thereto, revealed that the unnamed alleged co-conspirators included Jimco, Inc., Radcliff Materials, Inc. and Jahncke Services, Inc. It thereafter filed a third-party complaint naming Jimco, Inc., Radcliff Materials, Inc. and OKC Dredging, Inc. (the successor to Jahnke Services, Inc.) as third-party defendants. In the third-party complaint, Texas Industries sought contribution from the third-party defendants in the event it was found liable to Wilson P. Abraham Construction Corporation in the main demand.

Each of the third-party defendants filed motions pursuant to Federal Rule 12 (b) (6) seeking dismissal of the third-party complaint contending that no right of contribution exists among alleged antitrust co-conspirators under the antitrust laws of the United States.

The District Court granted the motions to dismiss filed by the third-party defendants and entered an order expressly determining that there was no just reason for delay in the entry of judgment until final determination of all issues in this action, and directing the Clerk to enter the October 4, 1977 Minute Entry as a final judgment. In accord with the said March 29, 1978 order, final judgment was entered on March 29, 1978 dismissing Texas Industries' third-party complaint with prejudice.

Texas Industries timely filed its Notice of Appeal from the judgment of the District Court and on October 16, 1979, the Fifth Circuit handed down its opinion affirming the District

Court's dismissal of the third-party complaint and holding that no right to contribution exists under the Federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979. The aforementioned petition for writ of certiorari was filed in docket no. 79-1144 of this Court.

SUMMARY OF ARGUMENT

The issue before this Court is whether contribution is available under the antitrust laws.

Although Texas Industries, Inc. is, according to the record in Civil Action No. 75-2820 on the docket of the United States District Court for the Eastern District of Louisiana, only one of four corporations who purportedly violated the antitrust laws, it was the only one sued by Abraham Construction Corporation. Thus, without a right to contribution, Texas Industries may be cast in judgment and have to pay all damages sustained by the plaintiff, trebled, that were allegedly caused by the joint action of Texas Industries, Inc. and its three alleged co-conspirators.

Texas Industries submits that the denial of contribution under the antitrust laws offends basic principles of fundamental fairness. The complaint filed below by Abraham Construction Corporation asserts violations of 15 U.S.C. 1. That law specifies that ". . . ***every person*** who shall make any contract or engage in any ***combination*** or conspiracy hereby declared illegal shall be deemed guilty of a felony. . ." (emphasis added), Thus, by definition, 15 U.S.C. 1 violations require actions of more than one person before liability may attach.

Texas Industries submits that a no-contribution rule, pursuant to which a plaintiff, by his arbitrary or random selection, may impose upon one the liability for damages caused by a combination of parties, violates basic principles of fundamental

fairness.

15 U.S.C. 1 creates a clearly defined class of persons at whom the statute is directed - namely, those who combine to violate the antitrust laws. A no-contribution rule permits a plaintiff to create, by his arbitrary action alone, a smaller sub-class - namely those he chooses to sue, or against whom he decides to execute a judgment. This lack of similar treatment among those situated in the same class plainly runs afoul of basic fundamentals of fair play. There is simply no logical basis for a rule that permits the shifting of a potentially devastating financial burden to only one among many whose actions violated the law.

A no-contribution rule also runs afoul of this Court's rejection of ***in pari delicto*** as a defense to antitrust violations. In ***Perma Life Mufflers, Inc. v. International Parts Corp.***, 392 U.S. 134, 88 S. Ct. 1981 (1968), this Court concluded that although a plaintiff who reaps the rewards of treble damages may be no less morally reprehensible than the defendant, the law encourages his suit to further the policy of the antitrust laws. A rule that could permit a party to sue in its own right for damages suffered in part as a result of its own actions plainly conflicts with a rule that would deny that same party the right to seek contribution when sued by others for the same actions.

In the absence of a right to contribution, at least one of the basic objectives of the antitrust laws is clearly thwarted. There are three basic objectives of the antitrust laws: (1) deterrence of violations, (2) compensation of victims and (3) deprivation of fruits of illegal activities. ***Illinois Brick Co. v. Illinois***, 431 U.S. 720, 97 S. Ct. 2061 (1977).

Arguments have been made both ways on the relative deterrent effect of a no-contribution rule. Texas Industries submits that a rule recognizing the right to contribution acts as a

more effective deterrent than does a rule denying that right. The knowledge that one *will* have to share in the payment of a plaintiff's damages is a much more effective deterrent to violations than is a rule whereby a party *may* escape liability by virtue of a plaintiff's decision not to sue him.

However, and in any event, *only* under a rule whereby the right to contribution is recognized will all violators be deprived of the fruits of their illegal activities. One who escapes with his ill-gotten gains intact may be easily tempted to try again.

The recent development of the right to contribution under the federal common-law has seen an almost uniform recognition of that right. This Court, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974) evidenced an intent to do away with the old common-law rule against contribution. There is no reason why the same rationale should not be extended to antitrust cases.

ARGUMENT

A. Denial of Contribution Under the Federal Antitrust Laws Offends Basic Principles of Fundamental Fairness

The irrefutable effect of a no-contribution rule under the Federal Antitrust Laws is that a potentially devastating financial burden can be imposed upon only one defendant, or upon only those defendants against whom a plaintiff chooses to execute a judgment, solely by the random and arbitrary decision of that plaintiff himself.

For example, under the facts present in this case with Texas Industries, a grand jury, sitting in the United States District Court for the Eastern District of Louisiana, handed down criminal indictments in January of 1973 charging Texas Industries, Radcliff Materials, Inc., Jahnke Services, Inc., Jimco Inc., with violating the antitrust laws. The indictment charged the

existence of an unlawful combination and conspiracy in restraint of interstate trade consisting of an agreement ***between the defendants*** to raise and stabilize the price of ready-mix concrete in the New Orleans area.

After conclusion of the criminal proceeding, Wilson P. Abraham Construction Corporation filed a civil action naming only Texas Industries and its former employee as defendants, tracking the allegations of the indictment. Thus, for its own reasons, known only to it, Abraham Construction Corporation by its own random and arbitrary decision, may, without benefit of contribution, impose potentially massive financial burden upon only one of alleged multiple offenders.

It has, of course, long been recognized that antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy to which they are a party. ***Lawlor v. National Screen Service Corp.***, 349 U.S. 322, 75 S. Ct. 865 (1955). The private plaintiff need not sue all co-conspirators; he may, instead, choose to proceed against any one or more of them. ***Northwestern Oil Co. v. Socony-Vacuum Oil Co.***, 138 F. 2d 967, ***cert. den.*** 321 U.S. 792, 64 S. Ct. 790 (1944). Some decisions have gone so far as to hold that a participant in an illegal conspiracy may be liable for damages caused by activities in which it neither participated nor benefited from. ***Twentieth Century Fox Film Corp. v. Goldwyn***, 328 F. 2d 190 (9th Cir. 1964), ***cert den.*** 379 U.S. 880, 85 S. Ct. 143 (1964).

However, notwithstanding the rulings of those cases, it is simply not logical to conclude that Congress could have intended that sub-class be randomly or arbitrarily created out of a clearly defined class, and receive special treatment under the antitrust laws.

The complaint filed against Texas Industries contained

allegations of violations of 15 U.S.C. 1. The provisions of 15 U.S.C. 1 specify that "*every person* who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony . . ." (Emphasis added). Under 15 U.S.C. 1, there must be an illegal *combination*. By definition, for there to be a violation of the statute, more than one person must be involved. One person cannot, by his individual action, violate 15 U.S.C. 1.

Thus, the class of persons at whom the punitive treble damages provisions of the Clayton Act, 15 U.S.C. 15, is aimed are those found guilty of violating the anti-trust laws. A no-contribution rule under the anti-trust laws clearly creates a sub-class within that class. The sub-class can be limited to those actually sued, or those against whom the plaintiff chooses to execute a judgment. This sub-class is defined solely by the random and arbitrary selection of a plaintiff. The severity of the burden imposed by such a rule could depend solely upon the number of defendants selected to be sued by a plaintiff or the number against whom the plaintiff chooses to execute. Nothing in the relevant statutes, nothing in the legislative history and nothing in the previous interpretive decisions of any of the courts suggest that Congress had such an intent.

It is suggested, therefore, that in imposing the requirement that there be an illegal *combination* for one to be held liable for a 15 U.S.C. 1 violation, Congress clearly intended that all who combine illegally be treated as members of the same class; treated equally in terms of the punishment provided therein and in the Clayton Act. Had Congress intended that those sued, or those against whom a plaintiff chooses to execute a judgment, would have to pay the total damages caused by the joint action of the parties, such an intent would have somehow been manifested in the statute itself.

Under a no-contribution rule, the lack of similar treatment

among those situated in the same class not only obscures the full objectives of the antitrust laws, it runs afoul of basic fundamentals and objectives of fair play.

This Court has recognized that fair play is the essence of due process. *Galvan v. Press*, 347 U.S. 522, 530, 74 S. Ct. 737 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693 (1954). If the antitrust laws are construed in such a manner as to place sole responsibility upon less than all wrongdoers to pay what is a joint obligation, and what is in effect far greater than his participation in the scheme, with no right of contribution, fair play has obviously been lost. There is simply no logical basis for shifting this potentially devastating financial burden to less than all whose actions violated the statute.

In *Barbier v. Connolly*, 113 U.S. 27, 5 S. Ct. 357 (1885), this Court observed that the Constitution intended that ". . . equal protection and security should be given to all under like circumstances", and ". . . that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . .". 113 U.S. 31.

Then, in *Hayes v. Missouri*, 120 U.S. 68, 7 S. Ct. 350 (1887), the Court decreed that equal protection ". . . requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both ***in the privileges conferred and in the liabilities imposed.***" 120 U.S. 71-72 (emphasis added).

Later on, in *Traux v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124 (1921), it said that the guaranty of equal protection ". . . was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as

clearly a denial of equal protection of the laws as to the latter class. . . " 257 U.S. 333.

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979), the only appellate court decision to date recognizing a right of contribution under the antitrust laws, the Court of Appeal for the Eighth Circuit followed the direction of *Cooper Stevedoring Co. v. Fritz Kopke*, 417 U.S. 106, 94 S. Ct. 2174 (1974), wherein this Court concluded that "a *'more equal distribution of justices'* can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame". 417 U.S. lll.

The Eighth Circuit explained that "[t]he deciding factor in our decision is *fairness between the parties.* We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious *lack of sense and justice* in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone *because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.*" 594 F. 2d at 1185 - 86 (emphasis added).

The Eighth Circuit's logic is irrebuttable. Without a right of contribution, each defendant in an antitrust case involving joint action is exposed to the possibility of being compelled to pay all of the plaintiff's damages, trebled, while others, equally liable, pay nothing. The result of such exposure in, for example, large national class action litigation could be overwhelming and could easily result in a reduction of competition itself by financially devastating one of multiple wrongdoers. Some defendants, though they may profess innocence, could nonetheless be confronted with the risk of potential liability based upon, for example, national sales of all defendants com-

bined, and could be forced to settle without regard to culpability.

There is an obvious lack of justice and fair play in allowing potential massive liability to be imposed solely by virtue of the random or arbitrary action of a plaintiff.

B. The Denial of Contribution is Inconsistent With the Underlying Rationale of this Court's Rejection of In Pari Delicto as a Defense to Antitrust Actions

A rule against contribution under the antitrust laws is patently inconsistent with the underlying rationale behind this Court's rejection of the doctrine of *in pari delicto* as a defense to antitrust claims.

The demise of the *in pari delicto* doctrine, which literally means "of equal fault", as a defense in antitrust cases apparently began in *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 61 S. Ct. 703 (1941), where a trade commission cease and desist order was upheld by this Court, thereby prohibiting certain garment manufacturers from boycotting retailers who copied their designs. This Court ruled that even if copying of designs was an acknowledged tort, that would not justify the antitrust violations.

Citing *Fashion Originators' Guild* as its authority, this Court ruled, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S. Ct. 259 (1951), that:

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize

them against liability to those they injured.

340 U.S. at 214.

The disappearance of the *in pari delicto* defense in antitrust cases was finalized in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968). The principal question in *Perma Life* was whether plaintiffs in a private antitrust action could be barred from recovery by virtue of their own participation in the scheme. The plaintiffs operated Midas shops under sales agreements with Midas, Inc. They charged that Midas conspired with others in violation of the Sherman, Clayton and Robinson-Patman Acts. With respect to the Sherman and Clayton Act Claims, the Court of Appeals held that the claims were barred, noting that the plaintiffs had themselves enthusiastically sought the Midas franchise with full knowledge of the allegedly illegal terms of the agreements, had made enormous profits, had eagerly sought additional franchises, and had voluntarily entered into additional franchise agreements fully aware of the restrictions on products they could carry and on persons they could deal with, all of which they were now challenging as violations of the antitrust laws.

This Court disagreed with the Court of Appeals, pointed out that there was nothing in the language of the antitrust acts that indicated Congress wanted to make *in pari delicto* a defense, and concluded that:

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, ***but the law encourages his suit to further the overriding public policy in favor of competition.*** A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

392 U.S. at 139 (emphasis added).

This Court also observed, in *Perma Life*, that "the purposes of the antitrust laws are best served by insuring that the private action will be an everpresent threat to deter anyone contemplating business behavior in violation of the antitrust laws." 392 U.S. 139.

If, *in order to further the objective of the antitrust laws*, a participant in an unlawful scheme is not precluded from suing other participants in the scheme, and recovering damages caused in part by his own actions, no rationale can support the denial of that same participant's right to seek contribution in the event he is held liable to some third-party for the same actions. It follows, then, that a no-contribution rule is clearly inconsistent with the holding in, and the underlying rationale of, *Perma Life*.

C. The Availability of Contribution Promotes The Objectives of the Antitrust Laws

In *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 at 2075 (1977), where the issue was whether indirect purchasers can recover under the antitrust laws, this Court said:

> It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injuried by antitrust violations. Of course, as Mr. Justice Brennan points out in dissent, 'from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation'. *Post* at 2082. But §4 has another purpose in addition to deterring violators and *depriving them of 'the fruits of their illegality'*, *Hanover Shoe*, 392 U.S. at 494, 88 S. Ct. at 2232; it is also designed to compensate victims of antitrust vio-

lations for their injuries."

This Court has, thus, viewed the objectives of the federal antitrust laws as threefold. They are designed to deter violations of the laws, to compensate the victims of anticompetitive activities, and to deprive those who violate the laws from the fruits of their illegal activities. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314, 98 S. Ct. 584 (1978).

As previously observed, it is well recognized that an antitrust plaintiff has historically been given the option of suing any one or all of the alleged co-conspirators. However, if a plaintiff, for whatever reason, chooses not to sue all alleged co-conspirators, some would thereby escape liability if they cannot be subjected to contribution. In such cases, the objectives of the antitrust laws would in large part be thwarted. Although the private plaintiff would be compensated for his injuries, assuming he has chosen solvent defendants, the alleged conspirators whom the plaintiff chooses not to sue would keep the fruits of their illegality, and, as to them, the deterrence of future anticompetitive activity would be substantially lessened.

The importance of depriving the antitrust violator of the fruits of his illegality was also recognized in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224 (1968), where this Court said that:

> In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by pricefixing or monopolizing *would retain the fruits of their illegality because no one was available who would bring suit against them.*

> Treble damage actions, the importance of which the Court has many times emphasized, ***would be substantially reduced in effectiveness.***

392 U.S. 494 (emphasis added).

Congress has already provided great deterrence under the antitrust laws in that those found guilty of violations will pay treble damages. However, ***the objective of depriving the tortfeasor of the fruits of his illegal acts can be assured only where there is a rule permitting contribution.***

A persuasive argument can also be made that, contrary to the rationale of the Fifth Circuit Court of Appeals, as expressed at 604 F. 2d 897, contribution enhances, rather than lessens, the deterrence objective of the antitrust laws. As the Eighth Circuit recognized in ***Professional Beauty Supply, supra,*** contribution means greater deterrence:

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tort-feasors may go 'scot free'. This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

594 F. 2d at 1185. The Seventh Circuit recently reached the same result in ***Heizer Corp. v. Ross,*** 601 F. 2d 330 (7th Cir. 1979), where it held that under the securities laws, apportioning the loss among all culpable parties enhances the deterrent effect of the judgment.

Moreover, as a practical matter, a person contemplating anticompetitive activities is much more likely to be cognizant of, and give consideration to, the treble damage exposure for violations of the antitrust laws than he is to the possibility that he may not be sued and thereby escape liability.

The denial of contribution would actually bring about a result totally anomalous to the very intent behind passage of the antitrust laws, which is to promote, encourage and protect competition. Permitting a plaintiff to shift total loss onto only one of multiple wrongdoers could, in many cases, actually deter and hinder competition by unduly burdening less than all of the equally guilty competitors.

Other potential adverse consequences of a rule against contribution must likewise be considered. The Seventh Circuit Court of Appeal recognized one significant danger in *Kohr v. Allegheny Airlines, Inc.*, 504 F. 2d 400, *cert. den.*, 421 U.S. 978, 95 S. Ct. 1980 (1975), where, though it was not considering contribution in an antitrust context, it noted the obvious lack of sense and justice in a rule permitting the entire burden of a loss to be shouldered by only one of several wrongdoers due to the plaintiff's whim or spite, "... ***or his collusion with the other wrongdoer,*** while the latter goes scot free". 504 F. 2d 405 (Emphasis added).

Texas Industries has no reason to suggest that there has been any collusion whatsoever between Abraham Construction Corporation and any of those whom Texas Industries sought to third-party for contribution. However, this Court must consider the limits to which a private plaintiff can go in choosing, among multiple conspirators, the one or ones he wishes to saddle with the burden of paying for his injuries. That limit must be consistent with antitrust policy. There should be no encouragement for parties injured by violations of the antitrust laws to collude with one wrongdoer against another in prosecuting his action, which in itself would be anticompetitive collusion against the one sued.

Without contribution there is no one who can bring suit against those whom a plaintiff chooses not to sue. As this Court recognized in *Perma Life Mufflers, Inc., supra*, a rule barring a culpable plaintiff from filing suit can diminish the

deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly and uncertain antitrust litigation. However, a rule barring contribution not only lets those not sued keep the fruits of their illegality, thereby creating an unjust windfall, it likewise reduces the pool of potential private attorneys general. Both results evade basic objectives of the antitrust laws.

D. The Right to Contribution Among Joint Tort-Feasors Has Evolved Under Federal Common Law and Should Be Applied Under the Antitrust Laws

One of the earliest cases in which this Court considered the question of contribution was *Union Stockyards Co. v. Chicago, Burlington & Quincy Railroad Co.*, 196 U.S. 217, 25 S. Ct. 226 (1905), where it was stated that:

> Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.

196 U.S. at 224.

The source of this "well settled" general principle of law is unclear. One notable commentator suggests that the rule had its origin in the ancient English case of *Merryweather v. Nixan*, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799). See Prosser, Torts 246 (2d Ed. 1955).

The rule survived for many years. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277 (1952), an admiralty case, this Court observed that:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they

> cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.

342 U.S. at 285.

After *Halcyon*, however, changing trends began to emerge, reflecting a growing approval of the right to contribution. The Third Circuit Court of Appeal rejected the *Merryweather* doctrine in *Gomes v. Brodhurst*, 394 F. 2d 465 (3rd Cir. 1967), where it analyzed the right to contribution this way:

> The first question is whether a right of contribution generally exists among joint tortfeasors. That no such right is recognized at common law has long been clear. See, e. g., *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (1799). Nor do we find reference to such a right in the statuatory or reported decisional law of the Virgin Islands. After extended consideration, however, we have decided that there is no compelling reason to defer or deny applying what we deem a rule of reasoned fairness. There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations.

394 F. 2d at 467-68.

The Seventh Circuit Court of Appeal has flatly rejected the contention that there is no federal common law right of contribution. *Kohr v. Allegheny Airlines, Inc., supra.* In *Kohr*, which involved a mid-air collision over Indiana, the issue was whether the trial court properly dismissed a demand for contribution. First ruling that federal interests in regulating airways required

application of federal law with respect to the question of whether or not contribution was available, the Court then held:

> Having determined that a federal rule of contribution and indemnity among tort joint-feasors should control in aviation collisions, we reject as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of 'no contribution'. We agree that '[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the palintiffs' whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.'

504 F. 2d at 405.

This Court, in ***Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., supra,*** clarified the rule enunciated in ***Halcyon*** and went a long way toward recognizing a federal common-law rule of contribution. ***Cooper Stevedoring,*** as did ***Halcyon***, involved admiralty law. An employee of a stevedoring company sued a vessel owner for injuies sustained when he fell into a concealed gap between crates previously loaded by another stevedoring company. The vessel owner successfully obtained contribution from the first stevedoring company, which the latter asserted was in direct conflict with ***Halcyon***.

In rejecting that argument, this Court pointed out that in ***Halcyon*** the plaintiff was covered by the Longshoreman and Harbor Workers' Act and thus was barred from suing his employer. It further observed that when ***Halcyon*** sought contribution from the plaintiff's employer as a joint tort-feasor,

recovery was denied since the employer was statutorily immune from a suit by the employee and so could not be liable for contribution. The Court explained its ruling in *Halcyon* this way:

> Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.

417 U.S. at 112.

In thus restricting the scope of the *Halcyon* ruling, this Court said that its decision in that case stands for a more limited rule than an absolute bar against contribution and that it should be read with its historical backdrop in mind. Then, with respect to contribution when there is no such statutory immunity, the Court reasoned that:

> Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate where two parties 'are both in fault, they should bear the damage equally, to make them more careful'. *The Alabama, supra,* at 697. And a 'more equal distribution of justice' can best be achieved by ameliorating the *common-law* rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U.S. at 110-11 (emphasis added).

The underlying rationale of this Court's ruling in *Cooper*

Stevedoring seems clear. Where two or more parties are jointly at fault, damages should be borne equally to make them more careful. This rationale should be equally applicable in an antitrust context.

Indeed, the first appellate court decision involving the precise question of the availability of contribution under the federal antitrust laws recognized that right. ***Professional Beauty Supply, Inc. v. National Beauty Supply Inc., supra.***

Professional Beauty Supply, Inc., a wholesaler of beauty supplies, claimed that National, a competitor, had demanded that LaMaur, a beauty supplies manufacturer, grant it an exclusive dealership. Professional contended this constituted monopoly or attempted monopoly. National, in turn, demanded contribution from LaMaur, who filed a motion to dismiss for failure to state a claim, which was granted.

In reversing the District Court, the Eighth Circuit Court of Appeal held that under certain circumstances, a defendant in federal antitrust cases may be entitled to pro rata contribution from other joint tort-feasors. 594 F. 2d 1182. In reaching that result, the Eighth Circuit concluded that fairness between the parties dictated that contribution be available.

The Seventh Circuit Court of Appeal followed the rationale of both ***Cooper Stevedoring, supra,*** and ***Professional Beauty Supply, supra***, while holding that contribution was available under the securities laws. ***Heizer Corp. v. Ross,*** 601 F. 2d 330 (7th Cir. 1979). In reaching that conclusion the Seventh Circuit Court of Appeal observed that:

> The policy underlying the securities laws is reinforced by applying contribution. By apportioning the loss among joint wrongdoers ***the deterrent effect of the***

> ***judgment is felt by all culpable parties*** and the protected investor class has available to it a broader source of reimbursement.

601 F. 2d 332 (emphasis added).

Unlike previous cases involving the question of contribution under the securities laws, the Seventh Circuit found it unnecessary to determine whether a right of contribution should be implied under those laws:

> It is unnecessary to apply the four *Cort* tests to this implication of a remedy inasmuch as they have successfully been applied in order to imply a civil remedy under Rule 10b-5 in the first place. Contribution is ancillary to that remedy and it serves the same policy.

601 F. 2d 333.

No legitimate reason exists for application of a different standard under the antitrust laws.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the Court of Appeals for the Fifth Circuit in both ***Westvaco Corp., et al v. Adams Extract Co., et al*** and ***Texas Industries, Inc. v. Radcliff Materials, Inc., et al,*** recognize the right to contribution under the antitrust laws, and remand the two cases for further proceedings.

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CERTIFICATE OF SERVICE

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